89-558

Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN P. GREY, Petitioner,

v.

THE FIRST NATIONAL BANK OF CHICAGO
and DANIEL J. WROBLEWSKI, Respondants.

PETITION FOR WRIT OF CERTIORARI TO THE APPELATE COURT OF ILLINOIS, FIRST DISTRICT

John P. Grey, Pro Se
5536 W. Hutchinson St.
Chicago, Illinois 60641
(312) 282-5334

February 6, 1989

QUESTIONS PRESENTED

I.

Does the opinion below, which recognizes retaliatory disciplinary actions of a National Bank against a potential employee/witness as "unavoidable aspects of employment," frustrate federal criminal laws under 18 USC Secs. 4, 1503, 1510, 1512, 1513.

II.

Is an employee of a National Bank (federal agency), who is a witness to that Bank's alleged criminal activities, entitled to recover for retaliatory discharge (a tort recognized in Illinois) where such Bank intentionally breaks that employee's mental and physical capacity down forcing him to resign?

III.

Is an employee of a National Bank (federal agency) entitled to recover for the intentionnal infliction of emotional distress (a tort recognized in Illinois) where such Bank intentionally causes its employee to suffer from high blood pressure, nervous breakdowns and mental depression in order to punish and deter such employee from reporting its criminal activity to the proper authorities?

IV.

What remedy should courts provide for a wrong that would otherwise go unredressed?

LIST OF PARTIES

The parties to the proceedings below were the petitioner John P. Grey and the respondants First National Bank of Chicago and Daniel J. Wroblewski.

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I. Retaliating by abuse of authority over a front line employee who is a potential witness to crimes of his employer must not be "unavoidable aspects of employment" as ruled by the appelate court in the opinion below, since it is against public policy and frustrates the Obstruction of Justice Statutes under 18 USC Secs. 1503, 1510, 1512 and 1513 17

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN P. GREY, *Petitioner,*

v.

THE FIRST NATIONAL BANK OF CHICAGO
and DANIEL J. WROBLEWSKI, *Respondants.*

PETITION FOR WRIT OF CERTIORARI TO THE APPELATE COURT OF ILLINOIS, FIRST DISTRICT

The petitioner, John P. Grey, prays that a writ of certiorari be issued to review a judgement and order, entered May 5, 1988, by the Appelate Court of Illinois, First District.

OPINION BELOW

The opinion of the Illinois Appelate Court, First District is reported as 169 Ill.App.3d 936, 523 N.E.2nd 1138 and is reprinted in the appendix hereto, page A-3. The decision of the Illinois Supreme Court, denying appeal, is not reported, and is reprinted in the Appendix hereto at page A-2

JURISDICTION TO REVIEW

The date of the order and judgement of the Illinois Appelate Court, First District sought to be reviewed is May 5, 1988. The Supreme Court of Illinois denied Petition for Leave to Appeal on October 6, 1988. Petitioner filed an Application for Extension of Time to file Petition for Writ of Certiorari on January 4, 1989. Application for extension was allowed by the Honorable Justice John Paul Stevens by order on January 6, 1989 extending time to file a writ of certirori up to and including February 6, 1989.

The jurisdiction of this Court is invoked under Scetion 1651 (a) of Title 28, United States Code.

The following decisions sustain the power and jurisdiction of this Court to review the order and judgement of which is herewith sought:

(1) Easton v. Iowa, 188 US 220 at 221: "National banks are agencies of the National Government created by Congress to enable it to exercise and conduct its fiscal powers and operations. They are instruments of the Federal Government created for public purposes and as such necessarily subject to the parmount authority of the United States."

(2) Davis v. Elmira Savings Bank, 161 US 275 at 283: "National Banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created."

No remedy is available in Illinois to an employee who has been damaged in person and property by his employer because Illinois courts recognize that retaliatory and harrassing conduct by such employer against its employee, (a witness to the employer's crimes), are unavoidable aspects of employment."

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue the common law writ of certiorari, as requested in this petition, are set forth later under the heading "Reasons for Granting the Writ" on pages 17-25.

STATUTES INVOLVED

18 USC Sec. 4, Misprison of Fellony

18 USC Sec. 1503. Influencing or injuring officer, juror or witness generally

18 USC Sec. 1510. Obstruction of criminal investigations

18 USC Sec. 1512. Tampering with a witness, victim, or an informant

18 USC Sec. 1513. Retaliating against a witness, victim, or an informant

18 USC Sec. 1621. Perjury generaly

18 USC Sec. 1622. Subornation of perjury

(See Appendix Pages A-13 to A-17)

STATEMENT OF THE FACTS

Petitioner, John P. Grey, was employed by the First National Bank of Chicago ("Bank"), respondant from January 16, 1968 up until his involuntary termination on September 14, 1979. In 1972 pertitioner worked as an assistant legal analyst, in the Trust Legal Service Department. After receiving a number of "above average" ratings, petitioner was promoted to legal analyst. Basically, his duties included the preparation of records for new trust accounts, and changes of records as instructed by Trust Officers, and verification of authority to make such changes.

In 1976, Daniel J. Wroblewski, ("Wroblewski"), respondant, became supervisor of the Trust Legal Service Department, and over the next two annual review periods, gave petitioner above average ratings.

Linda Matsler ("Matsler"), had charge of "class action litigation" in addition to her duties as a reviewer in the same department.

In March of 1978, Matsler, asked petitioner to help her mail some documents, but was unable to do so because the mailroom was closed. She then informed petitioner that the deadline for filing those documents had passed.

In April of 1978, within a several day span, petitioner observed a Bank Vice-President/Attorney, Helene J. Hahne ("Hahne") at Matsler's desk on two occassions. Both times Hahne placed a document in front of Matsler for her signature, and both times Matsler refused to sign it, once pushing it away from her back to Hahne. Matsler claimed that she refused to sign the document (an affidavit) because she was sure that the proof of claims were not sent out on time. Shortly thereafter, Matsler was removed for the "class action litigation", and had her workload as a reviewer greatly increased, and was given work to perform below her grade level, including the filing of dockets in cabinets that stood 5.5 feet high. Matsler stood 4 feet 10 inches tall, had a crippled leg, and would find such work difficult to perform.

In July of 1978, petitioner took an unscheduled two week leave of abscence in order to care for his mother who was hospitalized, recovering from a second heart attack and hypertension. Upon his return, Wroblewski had summoned petitioner to the conference room to make inquire as to his mother's health. In the

course of conversation, petitioner related that his father had also suffered from hypertension, resulting in a fatal stroke, and expressed his concerns that he was likely to develop the same condition if exposed to prolonged periods of stress. Wroblewski noted that petitioner looked distressed and suggested that he take two days off. Upon his return, he had learned that Matsler had resigned to attend law school.

In August of 1978, at a department meeting, Wroblewski indicated that until further notice, Annie Amos ("Amos"), a black legal analyst, would be assigned substantially more work and that the remaining two white co-workers, including petitioner, would be assigned either no or very little work. After the meeting, Amos expressed her views to petitioner that she felt Wroblewski was prejudiced against blacks, which was the reason he had reassigned most of the work to her. Petitioner arrived at the same conclusion because he had overheard Wroblewski say in a phone conversation in December of 1976 that there were two "coons" in the department that he wanted to get rid of. Amos further disclosed to petitioner that Hahne had tried to get Matsler to sign a false affidavit for the Bank in conjunction with her assignments in "class action litigation."

In November of 1978, while working on a group family of trusts (involved in class litigation) known as the "Oliver Trusts," petitioner became aware of the negligent loss of $160,539.73 to such trusts as a result of the Bank's failure to timely file certain proofs of claims for a "class action litigation" taking place in a Federal District Court in California. In addition, petitioner found a copy of an affidavit of Hahne that claimed that persons under her supervision had mailed the proof of claims in a timely fashion as determined by her follow-up with those persons. Based upon his previous discussion with Amos, and with Matsler regarding the late mailing of documents, plaintiff believed that Hahne had submitted a perjured affidavit to the Federal District Court in California after she could not obtain Matsler's signature to a sworn statement that the documents (proof of claims) were mailed in a timely fashion to the Court by Matsler. Matsler was sure they were not mailed on time which is the reason why she refused to sign an affidavit to that effect.

Plaintiff obtained a certified copy of the Bank's memorandum filed in the Federal District Court in California regarding the barring of trust claims because of the Bank's late filing of proof of

claims. In its Court memorandum, the Bank relies upon and repeatedly cites to Hahne's affidavit. The Bank sought to excuse its late filing of these claims based in substantial part upon the affidavit of Hahne claiming that proof of claims were mailed on time. Pursuant to the memorandum, the amount of claims the Bank lost for the trust beneficiaries amounted to $160,539.73

During the last week of November of 1978, Wroblewski asked petitioner to take over responsibility for the "class action litigation", previously handled by Matsler. Plaintiff declined because of his discovery of the negligent loss of over $160,000.00 to trust beneficiaries, the false affidavit and ill treatment of Matsler after she refused to sign the affidavit. Wroblewski replied that Matsler wasn't very cooperative with Hahne. Petitioner then stated his intentions of bringing the entire matter, including the false affidavit and loss of $160,000.00 to customer trusts and discriminatory actions against minorities, to the attention of the Personnel Division, which petitioner was required to do (pursuant to the Bank's Disciplinary/Discharge Action, 807 (e) under Major Offenses) or be subject to discharge himself for failing to do so. Wroblewski became tense and told petitioner that he was not going to allow plaintiff to "taint" the reputation of his department.

Beginning on December 5, 1978, Wroblewski formalized his threat by issuing petitioner a series diverse progressive disciplinary actions over the course of the following ten months, progressing him torwards discharge. These actions ultimately resulted in causing plaintiff to suffer from hypertension (the very condition he feared of contracting), nervous breakdowns and mental depression.

On December 5, 1978, Wroblewski summoned petitioner to the conference room and read a memo to him notifying him that he was not satisfied with his appearance regarding his belt, shoes and general appearance, and gave petitioner until December 11, 1978 to "purchase or otherwise acquire the proper attire", or he would institute disciplinary action.

Petitioner replied that he could only wear Florsheim shoes because of an orthopedic problem with his feet, but had another pair, practicality new, at the shoe repair store. Wroblewski also claimed that he checked petitioner's performance for November, and that he observed a lack of quantity and quality in his work and advised petitioner that he would commence disciplinary action by January 1, 1979 if there was no marked improvement

even though Wroblewski reduced the work load to petitioner pursuant to the August meeting.

Immediately following this meeting, petitioner called the Bank's Human Relation's "Hot Line" which is maintained by the Bank as a means of registering employee compaints regarding their treatment by management in their employment. Pursuant to the Personnel Policy Number 102, it is a violation of Bank policy for a supervisor to retaliate against an employee for filing a complaint against a supervisor.

Petitioner met with Roger Wojtkiewicz ("Wojtkiewicz") of that department and asked it there was anything wrong with his appearance. Wojtkiewicz replied "Well nothing really. Why?

Petitioner related that Wroblewski cited dress code violations and reported work performance deficiencies in retaliation for refusing to handle "class action litigation" involving the department's negligent loss to customer trusts and a false affidavit. Petitioner was referred to Michael Taylor ("Taylor") a Trust Personnel Manager.

When petitioner met Taylor, his first question posed to him was "What is wrong with my appearance?" Taylor replied "You look fine to me. What's the problem?" Petitioner related the threatened discipline for purported dress code violation and Wroblewski's allegations of poor work performance in retaliation for informing Wroblewski of petitioner's intention of reporting the false affidavit, $160,000 loss to customer trusts and discriminatory action against minorities. Pursuant to Bank Policy 102, Taylor was to gather facts to determine if a violation of Bank policy had occured. Taylor regarded petitioners assertion as to the falsification of the affidavit as true, and acknowledged that falsification of documents is a major offense which subjects the offender to immediate termination.

Taylor then informed petitioner that he would investigate the situation and get back with him later. However, according to Taylor, he never looked at the affidavit, although he told petitioner that he would investigate the facts concerning the affidavit. Later, Taylor conferred with Wroblewski about petitioner's complaints and matters relating to the affidavit, and his actions against petitioner. Taylor decided that it was not an appropriate issue to follow up on because it was brought up in a inappropriate manner which would embarras Wroblewski. However, Taylor felt that it was appropriate to follow up on

issues of dress code violations and work performance standards of petitioner.

Later, that same day, petitioner was called to a meeting attended by both Wroblewski and Taylor. Wroblewski was almost screaming at petitioner, demanding that he purchase a new pair of shoes. Petitioner indicated that because of his orthopedic problem and odd shoe size (13AA), that his shoes would have to be special ordered. Taylor agreed that Florsheim shoes would be acceptable. Wroblewski demanded "proof of purchase" of new shoes by December 18th. Petitioner was also ordered to cut his belt loops off his trousers. After the meeting, Taylor assured petitioner that his allegations of criminal offenses by a Bank Vice-President/Attorney would be investigated.

By December 15, 1978, petitioner had picked up his other pair of dress shoes that were repaired and began to wear them to work. Petitioner was not able to secure new shoes immediately because of the unavailability of his odd size (13AA). On December 18, petitioner placed a cash deposit for his order for new shoes at a local store, and later presented the cash deposit slip to Wroblewski. Wroblewski claimed that this cash slip as insufficient evidence that he had actually ordered new shoes. Plaintiff showed Wroblewski the repaired shoes he was now wearing and asked if they were acceptable. Wroblewski said they were, but still required further evidence for "proof of purchase" of new shoes. Taylor also agreed that petitioner's repaired shoes were acceptable, but supported Wroblewski's demand for further evidence for new shoes.

On December 26th, Wroblewski approached petitioner at his desk and requested additional proof. Petitioner replied that he had had been caring for his ailing mother who had suffered a heart attack six months prior, as well as his invalid uncle who was confined to a wheel chair, and that due to the limited hours the store was open, the holidays and the aftermath of Chicago's 1978 snowstorm, he was unable to secure the needed documentation for "proof of purchase" of new shoes. Wroblewski started screaming, demanding further evidence. Petitioner replied that the only way to obtain proof immediately was to send his mother to the store. Wroblewski replied "If that's what it takes, then do it!" Petitioner called his mother and related to her Wroblewski's demands.

That same day, she attempted to secure further evidence for the proof of purchase of new shoes and in leaving for the store, slipped on some ice, struck the back of her head, and broke parts of several teeth.

The next day, Decmeber 27th petitioner requested a meeting with Taylor, another meeting with Wojtkiewicz and finally, the last with both Taylor and Wojtkiewicz together.

At the first meeting with Taylor, petitioner threw his mother's broken teeth down on the table and stated that the matter concerning his "proof of purchas" and that now his mother had suffered as a consequence. Taylor agreed that it was getting out of hand and noted plaintiff's gestures as one of "outrage." Petitioner related the same information at the second meeting to Wojtkiewicz. At the third meeting with Taylor and Wojtkiewicz, petitioner was admonished for bringing personal problems (his mother's fall) to the attention of the Bank.

Later, that same day, Wroblewski sent petitioner a three page memo, demanding additional evidence for "proof of purchase" of new shoes by December 29, 1978 at 9:00 a.m. or be moved immediately into the second stage of the four step process for termination.

On Thursday, December 28th, petitioner requested an extension of time to the following Monday to submit further evidence for his new shoes since he wanted to take his mother that evening to her doctor because of the injuries she had sustained in the fall on the ice. Wroblewski denied the request. That same day, petitioner asked Taylor for an extension but was told by Taylor that his job was now in jeopardy. Upon further questioning, Taylor assured petitioner that the investigation regarding the purported false affidavit and negligent loss to customer trusts was ongoing. Petitioner secured additional "proof of purchase" for new shoes, and on the following day, submitted it to Wroblewski. On December 28th or 29th, according to Taylor, Taylor reached an agreement with Wroblewski that "Mr. Grey had supplied the documentation for the fact that the shoes had been ordered." However, Wroblewski now required a definite delivery date, even though petitioner was wearing "acceptible shoes."

During the entire month of December of 1978, petitioner met with Taylor at the bare minimum of every three days to discuss the ongoing disciplinary actions of Wroblewski and the progress of the investigation of the false affidavit loss of $160,000 to

customer trusts and discriminatory action against minorities. Petitioner was told the investigation was ongoing and not to intermingle the issues.

In late December of 1978, petitioner anoymously called the Securities Exchange Commission and explained the situation of the Bank's false affidavit. Petitioner was advised by an SEC attorney that they would have no interest in the situation, but advised plaintiff that the Federal judge in California would be the appropriate person to contact. Later, petitioner indicated his intentions of doing something (notifying the proper authorites) to which Taylor replied "No, don't do that. We're investigating the matter, and we're handling it here." Upon further inquiry, petitioner was assured by Taylor that an investigation was ongoing.

On January 2, 1979, petitioner requested a meeting with Benard Wall ("Wall"), a Vice President/Attorney, who was head of the Legal Group and Wroblewski's immediate supervisor. At a meeting attended by Wroblewski and Wall, petitioner detailed to Wall all of the allegations he made to Taylor, and according to petitioner said "Why are you dragging me into theis thing?" Wall's decision at the end of the meeting was to inform plaintiff that Wroblewski would conduct a special investigation of his work performance. To petitioner's knowledge, Wall conducted no investigation into the perjured affidavit or loss of customer assets.

On January 3, 1979, Taylor and Wroblewski called a meeting with petitioner and requested permission to call the shoe store to verify a delivery date for new shoes. Petitioner objected to being treated like he was in kindergarten, but when threatened with further discipline advancing him to another stage towards termination, yielded to his demand.

Wroblewski also advised petitioner at this meeting that he had only produced 77 items (80 items per month was Wroblewski's standard) and as a consequence issued an oral warning, (the first step for discharge). Petitioner replied that he could have been more productive if he had not attended so many meetings concerning the investigation of his new pair of shoes, petitioner's allegations of the Bank's false affidavit, loss of customer assets and Wroblewski discriminatory actions against minorities. That same day, Wroblewski called the shoe store and confirmed with the shoe store owner that "Mr. Grey had in fact ordered a pair of shoes."

As a result of the ongoing harrassment, plaintiff took off from work on Thursday and Friday, January 4th and 5th, because he became extremely nervous and ill, experiencing nausea, vomiting, anxiety and generally was in an agitated state over the situation at work. On Saturday, January 6, 1979, petitioner felt a little better and went to the shoe store to see if he had satisfied Wroblewski's inquiry regarding his new shoes. The salesman told petitioner that a person, who had identified himself as the President, called about petitioner's new shoes. The salesman asked petitioner what kind of place did he work for, and told him to have these people stop calling.

Petitioner returned home and experienced a total nervous breakdown (trembling and shaking all over, crying uncontrolably) with high blood pressure readings. He stayed in bed the rest of Saturday and Sunday. On Monday, January 8th, petitioner had his uncle call in sick for him since he did not feel capable of talking to Wroblewski. Wroblewski memorialized the call, noting in his memo that petitioner was "having a apparent nervous breakdown, shaking all over, and was not able to get out of bed." After learning of the aforementioned breakdown, it was the consensus of both Taylor and Wroblewski to refer the matter by memo to the medical staff.

By January 10th, petitioner felt well enough to return to work and that morning encountered Wroblewski who asked him how he felt. Petitioner told him he felt better, but stated that he had a nervous breakdown and was suffering from high blood pressure readings. Wroblewski began poking his finger into plaintiff's chest and told him "I think you are a security risk to the department. I think you stole my Silver Shoe and Royal Crown (personal objects removed from his desk by person or persons unknown) over a year ago. Petitioner reported this physical confrontation to Taylor. He began to experience chest pains and went to see Dr. Meredith, the Bank's physician. Dr. Meredith, found petitioner's blood pressure highly elevated and due to this and other symptons, suggested that petitioner had the symptoms of a heart attack. Afterwards, Dr Meredith sent petitioner home.

That very same day, Wroblewski sent a memo to his supervisor, Wall, requesting permission to do a credit check upon plaintiff—something he had never done for any other employee. He requested this investigation because petitioner only placed $5.00 (five dollars) as a deposit for his new shoes. The credit

check was approved by Wall and Mr. Whittemore, head of the Trust Personnel Unit, and the report received.

Sometime in January of 1979, while petitioner was off from work, Annie Amos, the black female co-worker, had called petitioner, in near tears, to tell him that Wroblewski had referred to her as a "nigger". She had asked Wroblewski for some time off of work to take her son to an opthamologist, to which he replied "What do you want me to do, hang up a big white sign saying IT'S BE KIND TO NIGGER WEEK?" Plaintiff related that he has already complaind about Wroblewski remarks and recommended that she go outside or take it to the highest authority.

Wroblewski's supervisor, Bernard Wall had a discussion with Wroblewski in Wall's office regarding Amos's complaint to the Human Resources Department. Wall concluded his investigation by stating that it was poor judgement for Wroblewski to use an ethnic slur as an example, whether Wroblewski was simply being naive or not. Wall's involvement in this action was governed under major offenses of Bank Policy 807 (g), which states in part that verbally harrassing or discriminating against any employee on the basis of race is cause for immediate dismissal. Wroblewski did not recall having any notation made in his personnel file, nor was Wroblewski required to resolve the matter with Annie Amos.

Petitioner was seen by his personal physician, Dr. John Sylvester, on January 12, 1979 who noted high blood presure readings and prescreibed Reserpine to control it. Plaintiff remained off of work, ill, until January 16th. That first morning back to work, Wroblewski set up a meeting with petitioner and Taylor and read three discipliary memos is succession to petitioner.

The first memo, five pages long, informed petitioner that pursuant to Bank Policy 807, that he allegedly engaged in a "deliberate misrepresentation" of the facts concerning the proof of purchase of his new shoes. One of the misrepresentations that Wroblewski claimed was that petitioner's shoes had to be "special ordered", even though Taylor maintained that they were a special order shoe. The memo concluded that should petitioner make any further misrepresentations concerning his shoes, that petitioner would be moved into the second stage pursuant to the Bank's disciplinary/discharge policy.

The second memo, six pages long, moved petitioner, immediately into the second stage of disciplinary/discharge stage

for allegedly misrepresenting the facts concerning his new shoes and because petitioner "failed to furnish proof of purchase for new shoes" even through he had furnished: (1) a cash deposit slip; (2) a purchase order slip, and (3) Wroblewski's personal confirmation from the shoe store owner that petitioner had, in fact ordered new shoes.

The third memo read by Wroblewski was to put petitioner on notice that although his work had improved, he was extending the period of scrutiny for work performance for an additional 90 days.

Following the meeting, Taylor observed that petitioner looked very upset and obviously had a high level of tension and agitation. Later that day, Wroblewski and Taylor summoned petitioner to the conference room where petitioner was read a fourth memo, 3 pages long, which criticized plaintiff's work performance for the prior year. In addition, petitioner was read his annual review which, in part, criticized his reluctance to accept additional duties (class action litigation). Petitioner was given only one day to respond and, was limited strictly to his work performance and told that he could not intermingle the issues of the false affidavit and loss of customer assest.

At this point in time, petitioner began to experience regular tightness and pains in the chest as well as high blood pressure. Petitioner visited Dr. Sylvester who placed him on a new drug, hydrodiurol, to better control his blood pressure.

From January 1, 1979 through February 9, 1979, petitioner, due to two or three nervous breakdowns, and anxiety, including nausea, vomiting, headaches, high blood pressure, shaking and chest pains, was absent from work for 16 full days and 4 half days.

On February 3, 1979, Wroblewski withdrew all petitioner's substantially completed work (except two items). This action made it impossible for petitioner to reach his monthly productivity requirements.

On February 13, petitioner was called to a meeting with Taylor and Wroblewski where petitioner was issued an oral warning recommending that petitioner improve his behavior and take control of his medical problems or be subject to further discipline.

On February 15, petitioner was summoned to another meeting

where he was asked to demonstrate compliance with the dress code regarding new shoes. Petitioner showed Wroblewski his new shoes. Wroblewski then stated that petitioner was now to be held indefinitely to the alleged "misrepresentation of the facts surrounding the proof of purchase of plaintiff's new shoes" in case petitioner should misrepresent any future matter.

During February, 1979, petitioner went on 7 different days to the Bank's medical unit for treatment of headaches, dizziness and tenseness. His blood pressure remained elevated even though he was taking medication to control it.

During the month of March, petitioner was asked, again, to work on "class action litigation" under Attorney Hahne. During this month, the petitioner was attended to in the Bank's medical unit for headaches and gastric upset. His blood pressure remined elevated.

In the first week of April, Wroblewski called plaintiff to another meeting and cited petitioner in a four page memo for allegedly not meeting the productivity for January, February and March having completed on 66, 60 and 65 items respectively. Petitioner complained that all his work was pulled from him and no new work, or very little, was assigned to him during this period. In fact, petitioner had completed 16 additional items in March which Wroblewski had claimed for his MBO reports to Wall. Wroblewski, however, gave credit to other analysts in the department for work completed but not signed out, while denying plaintiff credit for the 16 items for March completed but not signed out.

On April 6th petitioner went to the Bank's medical unit for headaches and pressure in the chest. His blood pressure was highly elevated. Dr. Mereith, the Banks physician, ordered plaintiff to see a specialist (doctor) that he approved. Dr. Balesteri, who was approved by Dr. Meredith, put petitioner on diazide to control his high blood pressure.

Later, in the month of April, petitioner registered complaints with various departments concerning the retaliatory action conducted against him as a result of his complaints of the Bank's perjury, loss of customer assest, and discriminatory actions against minorities.

In April, petitioner was placed under a newly trained reviewer. An analyst would get no credit for a completed assignment or item until the reviewer had signed off on it. From late April, until

the time of petitioner's involuntary termination in September of 1979, a large number of petitioner's completed items remained on his reviewers desk awaiting his signature (averaging in excess of 80 of his items).

In May, petitioner complained to Wojtkiewicz and Joanne Strong in the Human Relations Department of the backlog of work remaining on reviewer's desk in excess on 109 items. No action was taken by Wroblewski, Strong or Wojtkiewicz to remedy the problem. Petitioner continued to receive treatment at Bank's medical unit in June and July for headaches and blood pressure, which remained high despite the fact he was on medication which was supposed to control it.

On July 11, 1979, petitioner was again summoned to the conference room by Wroblewski who issued a final warning (a prelude to discharge). Wroblewski warned that if petitioner's productivity did not increase, he would seek dismissal. Petitioner noted (by counting items completed in Wroblewski's file box) that other analysts had underproduced for the months of May and June. In checking, petitioner found that Annie Amos had produced 57 and 58 items respectively; Keven Clark 66 and 59; Hall 48 and 56. Minimum requirements were 80 items per month.

Petitioner was again asked by Wroblewski to work on class action lititation under Hahne. Petitioner declined until there was an investigation of the matter of Hahne's perjured affidavit.

On at least five occassions between May and July, plaintiff discussed with Wroblewski the extreme backlog of work that remained on the reviewer's desk which pervented him from getting credit for completed assignments. There was no resolution of this problem.

From late July up to the termination of his employment, petitioner went to the Bank's medical unit on almost a daily basis to lie down and relax during his own breaks and lunch. During this period, he experienced frequent headaches, chest pains, high blood pressure and anxiety over his employment. His blood pressure remained high even though he was on medication to control it.

Based upon a continuing threat of termination by unwarranted disciplinary actions, the harassment petitioner received from Wroblewski, the lack of support or protection that was promised by Bank's personnel management, pursuant to Bank Policy 102,

and the consequential deterioration in petitioner's mental and physical condition, he submitted a letter of involuntary resignation on September 14, 1979.

Petitioner suffered form hypertension, insomnia, nervousness, headaches, persistant chest paines and difficulty in breathing and as a consequence was unable to contact the proper authorities of the Bank's misdeeds. Petitioner subsequently sought treatment from a psychiatrist, Dr. Leon Kuhs, who diagnosed his condition as "mental depression" and treated him with an antidepressant (doxepin hydrochloride).

Prefatory Statement

A recent number of judicial decisions in Illinois reflects a growing trend by Illinois state courts to favor employers that harass and retaliate against their employees who are witnesses to their crimes. Furthermore, these state courts regard such retaliatory conduct simply as "unavoidable aspects of employment."

Ironically, the same courts encourages employees (who have probable cause to believe that crimes have been committed) to report such crimes to the proper authorities without fear of discharge.

However, the same state courts have denied a cause of action for employees who are victims of retaliation at the hands of their employer, and who suffers damage to his person (both mental and physical) and property rights (his job) when such employee is forced to resign to save his health from further deterioration.

If perjury, subornation to perjury, concealment of loss to customer assets, and harassment and retaliation against employees (whom attempts to disclose such unlawful activity) are "unavoidable aspects of employment", then decisions of employees **not** to disclose such activity to save his health and his job **will** be an "unavoidable aspects of being a potential witness and informant."

Although National Banks are subject to state laws, any attempt by a state to control their conduct - in this case endorse their criminal conduct - is void whenever it conflicts with laws of the United States or frustrates the purposes of national legislation.

The following state decisions should be enlightening to this Court as to the growing trend in regard to employer/employee

relationships and should be helpful in determining whether a writ should be granted.

REASONS FOR GRANTING THE WRIT

I

Retaliation by abuse of authority over a front line employee who is a potential witness to the crimes of his employer must not be "unavoidable aspects of employment" as ruled by the appelate court in its decision below, since it is against public policy and frustrates the Obstruction of Justice Statutes under 18 USC Secs. 1503, 1510, 1512 and 1513.

In one case involving an employer/employee relationship, where the employee was a witness to a crime, the state court did not recognize a cause of action for the intentional infliction of emotional distress. Harris v. First Federal Savings & Loan, 129 Ill. App.3d 978, 466 N.E. 2d 1137 (1984).

In that case Harris, the plaintiff, reported suspected criminal activity of a co-worker to her supervisor and as a result, she was accused of "questionable judgement", transferred to a different location, demoted, segregated from her co-workers, given performance reviews more frequently than other employees, "continually berated and criticized", and her work was inaccurately critized. She was subjected to a second demotion, mistreated and maligned by her fellow employers. Her behavior was monitered and reported and she was given contradictory job instructions. After more than one year of this treatment, she was fired.

The Appelate Court, in Harris, found that the conduct of the employer was not"... so reprehensible that it rose to the level of outrageous conduct beyond all possible bounds of deceny, nor... that a reasonable person would have found that First Federal's actions were impossible to endure. "Harris v. First Federal Saving & Loan Association, 129 Ill. App.3d 978, 473 N.E.2d 457.

In citing the Heying case, the appelate court in Harris noted that:

"Personality conflicts, questioning of job performance and job transfers, whether for disciplainary or management purposes, are unavoidable aspects of employment. Frequently, they

produce concern and distress for the affected employee."
(473 N.E. at 459)

When the trial court in this case concluded that the activities of which the petitioner complained of were the result of "personality conflicts", it was constrained to follow the holding in Harris v. First Federal, 129 Ill. App. 3rd 978, 473 N.E. 2nd 457 (1984) and Heying v. Simonaitis, 126 Ill. App.3rd 157, 466 N.E. 2d 1137 (1984).

On that premise the appelate court, in the opinion below found that "the courts have recognized that questioning of job performance and personality conflicts are unavoidable aspects of employment and that stress is often the result; however, such stress can not form the basis of the tort of the intentional infliction of emotional distress or virtually [all] empoyee[s] would have a cause of action". Page ( ) of opinion.

But mangerial dicisions of federal agencies (National Banks) designed to violate criminal statutes in Federal Courts of law, and discriplinay action instituted for the purpose of inflicting severe emotional distress upon employees who make their intention known to report such violations to the proper authorites, **must** totally be avoidable aspects of employment.

What stands before this court is no mere "personality conflict" between an employer and employee but instead a confilict between an employer (a national bank) and the Federal judicial system, and an employee attempting to defend that system by disclosing the employer's illegal activity.

If National Banks, are permitted to conduct their business affairs by committing crimes of perjury in Federal Courts of law through their vice-president/attorneys, and have legal deference granted to them by state courts to "abuse their authority" over a front line employee in order to retaliate and coerce such employees from reporting crimes to the proper authorities, then the public policies as enacted under state and federal criminal statutes will be severely undermined.

II.

A National Bank, (a federal agency), which intentionally causes its employee who is a witness to its crimes, to suffer from high blood pressure, nervous breakdowns and mental

depression to deter the witness from reporting its crimes, frustrates public policy of the state and federal systems which encourages the reporting of crimes.

The Supreme Court of Illinois first sanctioned an action for intentional infliction of emotional distress in Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961). In 1976, the Illinois Supreme Court relied on the Restatement (Second) of Torts Sec.46 (1965) in order to outline the requirements for the tort. "First, the conduct involved must be truly extreme and outrageous. Second, the actor must either intend that there is at least a high probability that his conduct will cause serere emotional distress. Third, the conduct must in fact cause severe emotional distress. (Public Finance Corp. v. Davis (1976), 66 Ill.2d 85, 90.)

"The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining its severity" Restatement (Second) of Torts 46, comment j, at 77-78 (1965). It is clear that the tort does not extend to "mere insults, indignities, threats, annoyances, petty oppresions, or ther trivialties." Restatement of Torts, sec. 46 comment d, at 73 (1965).

In applying these principles in Public Finance v. Davis the Supreme Court noted "[A]s is stated in comment e, the extreme and outrageous character of the conduct may arise from ***abuse of*** a position or relation with another which gives the actor a poition or a relation with another which gives the actor actual or apparent ***authority over the other or power to affect his interests.***" (emphisis added) Public Finance v. Davis 66 Ill.2d 85, 90.

In a later case, Milton v. Illinois Bell Telephone Co., 101 Ill. App.3d 75, involving an employee/employer relationship, the appelate court found the employer liable for the tort because of the employer's retaliatory actions against an employee who refused to falsify work reports for billing customers.

The court in that case stated:

"As Dean Prosser pointed out, "The extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives him actual or apparent power to damage the plaintiff's interests. The result is something very like extortion." (Pro-

sser on Torts sec 56 (4th ed. 1971); accord. Restatement (second) of Torts sec. 46, Comment (1965), and Public Finance Corp., at 90.) The supreme court recently acknowledged that "relatively immobile workers who often have no other place to market their skill" do not stand on equal footing with the large corporations which employ them. (Palmateer v. International Harvester Co. (1981), 85 Ill.2d 124, 129, 421 N.E.2d 876.) Is is the alleged abuse of power by a large corporation over one of its front line employees which aggravates the outrageousness of the conduct alleged in this case." Milton v. Illinois Bell Telephone Co., 101 (Ill. App.3d. 75, 79.)

The appelate court distinguished Public Finance from Milton in that Public Finance was only insisting on its legal right to collect a debt even though it is aware that such insistence will cause emotional distress. In Milton the court did not show that the employer was insisting on his legal rights to demand that an employee falsify customer work reports and then retaliate against him for not doing so.

In a more recent case, MgGrath v. Fahey, 163 App. 30 Ill.2d., 584, the Illinois Supreme Court stated that: "Illinois cases in which intentional infliction of emotional distress has been sufficiently alleged have in fact very frequently involved a defendant who stood in a position of power or authority relative to the plaintiff."

In MgGrath, the court recognized a pattern of conduct that the bank used which was designed to coerce the plaintiff to assign second mortgages by threats of financial ruin plaintiff's medical practice and by withholding certificates of deposits worth $1 million of deposit he had in the bank, which he held in trust for third parties. Plaintiff's attorney related that plaintiff was experiencing anxiety over the situation and ultimately suffered a heart attack. While recovering form open heart surgery, two months later, Fahey telephoned plaintiffs everal times regarding their disputes.

The Supreme Court, in MgGrath found the "conduct could easily be deemed outrageous by a jury... in view of the apparent economic power which defendants excercised over plaintiff, in view of the alleged total lake of any legal jusification for the objective which defendants were attempting to achieve, and in view of defendant's alleged knowledge of plaintiff's special suscep-

tability." MgGrath v. Fahey, 163 App. 3d 584, _____ Ill. 2d _____, Docket No. 66346.

In this case before this Court, Wroblewski was aware of plaintiff's susceptibility to contracting high blood pressure which was fatal to his father as the result of a stroke and his mother, whom had already suffered two heart attacts. The Illinois legislature recognized the dangers of high blood pressure (hypertension) "as a major cause or contributor to sickness, disability and death" when it enacted The High Blood Pressure Control Act. Chapter 111 1/2 Sec. 2601 et seq of the Ill. Rev. Stats. (1977). Wroblewski's actions, given this knowledge, is truly reprehensible.

After contracting high blood pressure, because of unwarranted disciplinary actions, petitioner was unable to control it even with his blood pressure medication. The conduct is truly outrageous considering Wroblewski continued to threaten discharge while Taylor misled plaintiff into believing an investigation was underway pursuant to the Bank policy which prohibits such retaliatory actions. Such conduct falls within Federal Statutes, 18 USC sec., 4 and 1503.

The appelate court in the opinion below, stated in the Count I that it "does not sit in review of the internal disciplinary proceedings of the bank and [it] need not express an opinion as to the alleged harrassing nature of the proceedings," dispite taking note of the trial court's statement "there is little doubt that (Grey's) version of these events as set forth in his deposition testimony and his affidavit arguably presents a issue of fact on the question of (defendants') motivation for instituting disciplinary action against the plaintiff, and whether the discipline was, in fact well grounded." Pages A-9, A-10.

And yet in Count II, for the intentional infliction of emotional distress, the same appelate court stated "Regardless of its motivation, the bank did follow its internal policies and procedures for disciplinary proceedings." Page A-12.

Consequently, a national bank, by the opinion below can abuse its authority over a front line employee who is a witness to that bank's crimes by implementing a series of unfounded disciplinary actions against a employee/witness which is contrary to its own personnel policy, but which is violative of the Federal Criminal States of 18 USC Sec. 1512 - Tampering with a witness, victim, or and informant.

In Palmateer, the Illinois Supreme Court stated "public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to the effective implementation of the policy... and should not be deterred from reporting them by... fears of discharge." Palmateer v. International Havester Co., 85 Ill.2d. 124 at 132, 133.

It is indeed ironic, and goes beyond the principles of justice for the courts to encourage its citizens to something right (the reporting of crimes) as underscored as a matter of public policy in **Palmateer**, and recognize a cause of action in **Milton** for the intentional infliction of emotional distress because he was subjected to coercive action in order to make him do something wrong (committing crimes) while denying another, this petitioner, a cause of action because he was attempting to do something right (the reporting of crimes).

The Bank's conduct in this case was coercive and without legal justification. It is the abuse of authority over petitioner that aggravates the outrageousness of the conduct in this case. The fact is that the Bank successfully prevented the petitioner from reporting crimes to the proper authorities — first by misleading conduct and then by causing petitioner to suffer from hypertension and nervous breakdowns resulting in mental depression.

By the opinion below, employers now have a blue print and mechinism in force to deal with such "misguided employees" (while sending other employees a clear message)!

III.

A National Bank (a federal agency) that mentally breaks down its employee to deter him from reporting its crimes, and forces him to resign to save his own health violates the sound principles of public policy that encourages citizens to report of crimes.

The tort of Retaliatory Discharge was first recognized by the Illinois Supreme Court in Kelsay v. Motorola, Inc. (1978), 74 Ill.2d 172, in which an employer fired an employee after she filed a worker's compensation claim for a work related injury. The purpose was to ensure that sound public policy underlying the Workers' Compensation Act sould not be frustrated by the actions of an employer.

Later, Palmateer v. International Harvester Co., 85 Ill.2d 124 the tort was expanded to include employees who reported suspected crimes committed within the scope of their employment to a law-enforcement agency. The supreme court stated that the purpose was to ensure the public policy favoring the investigation and prosecution of criminal offenses. The appelate courts extended such protection to employees who reported crimes to management within the company even though they did not report alleged crimes to state authorities. (See Petrik v. Monarch Printing Corp., 143 Ill.App.3d 502, 444 N.E.2d 588 (1982), appeal denied, 93 Ill.2d 548 (1983) and Johnson v. World Color Press, Inc., 147 Ill.App.3d 746, 498 N.E. 2d 576 (5th Dist. 1986), appeal denied, 113 Ill.2d 575 (1987).)

The Courts in trying to define the limits of the tort of retaliatory discharge have always identified three elements for its recognition:

(1) The employee was discharged; (2) in retaliation for his activities; and (3) the discharge violated a clear mandate of public policy.

In defining "discharge" the Illinois Supreme Court recognized the existence an "involuntary termination" as an actual discharge where an employee was told that "she should seek other employment" and "directed plaintiff to sign a "Voluntary Resignation", Hinthorn v. Roland's of Bloomington, Inc. 119 Ill.2d 526 at 531.

In affirming that decision, in Hinthorn, the supreme court found that the appelate court reasoned that if an employer can obtain resignations from weaker willed and less sophisticated employees in order to retaliate against them ***for excercise of rights involving a public policy by threatening discharge, even by implication, the remedy promulgated by the retaliatory discharge doctrine can be signifcantly impaired. Emphasis added,*** Hinthorn Id. (151 Ill.App.3d at 1008).

The same appelate court, in another case, rejected the plaintiff's argument for "constructive discharge" because it found that the plaintiff ***admitted resigning voluntarily*** in response to the employer's actions. (ei) supervisors' instructions and suggestions that plaintiff not respond to State Agency inquiries, that plaintiff alter claims figure submitted to the State of Illinois, that plaintiff falsify evaluations of employees and forcing plaintiff to terminate a black employee without cause. Scheller v. Health Care

Service Corp., 138 Ill.App.3d 219, 485 N.E.2d 26 (4th Dist. 1985), appeal denied. 111 Ill.2d (38) (1986).

The distinction drawn by the supreme court in Illinois in **Hinthorn** and the appelate court's decision in **Scheller** was that plaintiff's termination in **Scheller** was a "voluntary termination of her employment", whereas the plaintiff in Hinthorn asserted she resigned involuntarily. In the instant case, the petitioner has, in his complaint, asserted the "**his resignation was not voluntary**". Although petitioner characterized his discharge as a "constructive discharge", his termination falls well within the parameters of the supreme court's decision in **Hinthorn.** Wroblewski stated that he was not going to allow petitioner to "taint" his department and formalized that threat by isssuing a series of disciplinary actions threatening discharge over a ten month period. When petitioner suffered from series of nervous breakdowns intententially caused by Wroblewski resulting in his involuntary termination, Wroblewski succeeded in his promise not to let petitioner "**taint**" his department for petitioner ultimately suffered from mental depression and was unable to report the Bank's conduct to the Federal judge in California. The Bank's criminal conduct is clearly reflected by the actions of the Trust Personnel Manager, Michael Taylor who repeatedly informed petitioner that an investigation regarding purported crimes of perjury and negligent loss of customer assets was underway, when it was not, nor never intended. Such conduct falls within the Federal Criminal Statutes, Misprison of Felony. 18 USC. Sec. 4.

Summation

The First National Bank of Chicago, an agency of the U.S. Government, exercised no legal right by retaliating against an employee who was a potential witness to its crimes. The Bank's conduct cannot be recognized as "unavoidable aspects of employment", otherwise employees having information regarding an employer's criminal activity will be deterred from reporting such conduct by fears of discharge and loss of health.

What makes the conduct of the Bank "outrageous in this case is that it know it could deter the petitioner form reporting crimes, first by misleading conduct and then by breaking the petitioner, emotionally and physically.

The petitioner is entitled to relief for such damages. In *Marbury v. Madison*, 1 Cranch 137, 163 (1803). Chief Justice Marshall invoked the authority of Blackstone's Commentaries in support of this proposition. Blackstone had written: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded....[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." 3 Commentaries *23, *109.

See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 428 (1971) (Black, J., dissenting).

Note: Petitioner does not argue discriminatory actions against minorties for a forced discharge-only motivation for emotional distress.

Conclusion

Cititzens need a clear understanding from this Court as to their role in judicial and law enforcemment systems, and for the foregoing reasons petitioner, John Paul Grey urges this Honorable court to grant certirori.

John P. Grey, Pro Se
5536 W. Hutchinson St.
Chicago, Illinois 60641
(312) 282-5334

Appendix

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Present The Honorable David Linn Judge.
Present The Honorable Glenn T. Jahnson Judge.
Prsent The Honorable Mary Ann G. McMorrow Judge.

Gilbert S. Marchman, Clerk. James E. O'Grady, Sheriff.

John P. Grey,

Plaintiff-Appellant,

No. 87-0479 vs.
First National Bank of Chicago and
Daniel J. Wroblewski,

Defendant-Appellees.

Appeal from the Circuit Court
of Cook County
(No. 81L11948)

AFFIRMING ORDER

The judgment of the Circuit Court of Cook County is AFFIRMED.

May 5th, 1988

CERTIFICATE

I certify that this is a copy of the order of the Appellate Court, First District. December 21st, 1988.

/s/ Gilbert S. Marchman
Clerk of Court.

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of September, 1988.

Present: Thomas J. Moran, Chief Justice

Justice Daniel P. Ward — Justice Howard C. Ryan
Justice William G. Clark — Justice Ben Miller
Justice Joseph F. Cunningham — Justice John J. Stamos

On the sixth day of October, 1988, the Supreme Court entered the following judgement:

No. 67126

John P. Grey,
Petitioner
v.

First National Bank of Chicago and
Daniel J. Wroblewski,
Respondents

Petition for Leave
to Appeal from
Appellate Court
First District
1-87-0479
81L11948

The Court having considered the Petition for Leave to Appeal and bing fully advised of the premises, the Petition for Leave to Appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final corder in this case.

IN WITNESS WHEREOF, I have hereunto
subscribed my name and affixed the Seal

of said Court, this twenty-eighth day
of October, 1988.
/s/ Juliann Hornyak
Clerk,
Supreme Court of the State of Illinois

FOURTH DIVISION
MAY 5, 1988

NOTICE
The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

87-0479

JOHN P. GREY,	)	
	)	APPEAL FROM THE
Plaintiff-Appellant,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
v.	)	
	)	
FIRST NATIONAL BANK OF	)	
CHICAGO and DANIEL J.	)	HONORABLE
WROBLEWSKI,	)	THOMAS HOFFMAN
	)	JUDGE PRESIDING.
Defendants-Appellees.	)	

JUSTICE LINN delivered the opinion of the court:

Plaintiff, John P. Grey, filed a two-count complaint against his former employer and supervisor, First National Bank of Chicago and Daniel Wroblewski, respectively. Count I attempts to state a cause of action in "Constructive retaliatory discharge" and Count II sounds in intentional infliction of emotional distress.

The trial court granted defendants motion for summary judgment on Count II and dismissed Count I for failure to state a cause of action.

On appeal, Grey contends that he was virtually forced to quit his job, because of defendants' misconduct, and that this court

should recognize the tort of constructive retaliatory discharge. In addition, Grey argues that genuine issues of material fact precluded the summary judgement entered against him as to Count II.

We affirm the trial court.

BACKGROUND

Grey was employed full time by the First National Bank of Chicago from January 16, 1968 until September 14, 1979. His duties as a legal analyst with the trust department of the bank included the processing of various trust documents for review by the bank's attorneys.

Grey's immediate supervisor for 1976 until his termination in 1979 was Daniel Wroblewski. According to the allegations of Grey's complaint, Wroblewski caused him to resign by harassing him in retaliation for Grey's opposition to the bank's filing an allegedly perjured affidavit in a Federal class action. The affidavit purported to excuse the bank's untimely submission of claims on behalf of certain trust accounts. Wroblewski also allegedly mistreated minority and handicapped employees.

According to Grey, in March 1978 he was approached by another employee whose responsibility it was to mail proofs of claim to the Federal court in California in connection with the class action. This employee, Linda Matsler, told Grey of her concern as to the timeliness of the claims because she thought a deadline had expired. Approximately a month later, Grey saw one of the bank's attorneys, Helen Hahne, repeatedly placed a document on Matsler's desk, apparently requesting her to sign it, which Grey did not observe Matsler do while he was watching.

Matsler was relieved of her responsibility for the class action assignment in May or June 1978. She complained to Grey that she was being overburdened with work assignments, which included filing of dockets in cabinets over five feet off the ground. Matsler stood 4 feet 10 inches and had a crippled leg. In August 1978 Matsler left the bank to attend law school.

In the summer of 1978, plaintiff's mother was hospitalized for two weeks because of a heart attack. Grey told Wroblewski that he was upset because it was his mother's second heart attack and his father had previously died from a heart attack and stroke. Both parents suffered from hypertension and Grey believed he

was a good candidate for that condition also. Wroblewski suggested that he take some time off, which he did.

In November 1978 Grey found a notice indicating that the bank's claim on behalf of certain trust accounts had been rejected in the California class action for failure to timely submit proof of authority. Grey also discovered an unexecuted affidavit prepared for Hahne's signature in connection with a motion to reconsider a court order in the class action. Grey believed that portions of the affidavit which dealt with the mailing of the proof of authority, was false. He believed that Hahne had submitted a perjured affidavit to the Federal district court after she could not obtain Matsler to sign a false affidavit. However, he had no first-hand knowledge of the matters in the affidavit and did not talk to Matsler about the affidavit until mid-December 1978. Ultimately, Grey obtained a certified copy of the memorandum that the bank had filed in the California class action, which sought to excuse the late filing of the trust claims based in part on Hahne's affidavit. The total amount of claims, which belonged to the trust beneficiaries, was $160,539.73.

Grey's initial confrontation with Wroblewski occurred in November 1978. Wroblewski assigned Grey the responsibility for the class action assignments previously handled by Matsler. Grey refused, stating that he did not want to do so until the Hahne affidavit matter was "cleared up." Grey also told Wroblewski that he objected to the way Matsler had been treated after allegedly refusing to sign Hahne's affidavit. Grey further informed his supervisor that he intended to bring these matters to the attention of the personnel department. According to Grey, Wroblewski replied that Grey was not going to "taint" his department.

In early December 1978, Wroblewski notified Grey that he was not in compliance with the dress code of the bank. He gave Grey approximately one week to conform to the code before he would institute discriplinary action. That deadline was extended because of Grey's representation that he had to special order his shoes, which would take a month or two to receive. Grey was to furnish proof of purchase to Wroblewski. Grey offered a cash register receipt in the amount of $5, which he claimed was the deposit on the order. Wroblewski rejected the receipt as inadequate proof that Grey had actually purchased or ordered the new shoes and gave him until Decimber 29 to furnish the requested proof.

Although Grey offered another receipt on December 29, it fail-

ed to indicate when the shoes would be delivered. Wroblewski then obtained Grey's permission to telephone the shoe store. Based on what the store's manager told Wroblewski, he concluded that Grey had not been altogether forthcoming in his representations and further concluded that Grey had failed to furnish proof that he in fact had ordered the necessary shoes. Accordingly, on January 16, 1979, Wroblewski read Grey a memorandum notifying him of his conclusion that Grey had failed to conform to the proof of purchase requirement and giving Grey another 30 days to either obtain different shoes or secure the ordered pair. When Grey finally obtained the shoes, the discipliary proceeding involving the dress code violations was concluded.

A second disciplinary proceeding had been initiated, however, arising out of Grey's alleged misrepresentations over the shoes. In February of 1979, Grey was conditionally discharged from this disciplinary proceeding.

The bank institued two other disciplinary proceedings against Grey, which arose out of Grey's excessive absenteeism and the quantity and quality of his work.

In December 1978 Wroblewski notified Grey that in his performance for the month of November, Grey had failed to meet the required production standard of 80 items of work per month. He had completed only 59 items. In December, Grey produced 78 items. Wroblewski told Grey that he would monitor Grey's work for the next quarter, January through March of 1979.

In early January 1979, during the shoe controversy, Grey had a nervous breakdown. He was trembling and registered high blood pressure readings. After several days of bed rest, he returned to work. Wroblewski told him he thought Grey had removed certain objects from Wroblewski's desk. Grey reported the incident and went to see the bank's doctor because of chest pains. The doctor sent him home because of elevated blood pressure. Grey saw his own physician and did not return to work until January 16, when Wroblewski read him several memos concerning various disiplinary matters. Grey took additional days off work because of his physical condition.

In February 1979, Wroblewski met with Grey to discuss his absenteeism. After informing Grey that he had missed 16 full days and 4 partial days out of a total 34 working days since January 1, 1979, Wroblewski gave Grey 30 days to substantially

improve his attendance record. Thereafter, Grey's attendance improved and this disciplinary action progressed no further.

In April 1979, Wroblewski again met with Grey to discuss the quantity of his work. Grey's production total for each of the three months was again below the mark by 15 to 20 items per month. Accordingly, Wroblewski told Grey that he would monitor his work for the next quarter.

At the end of the quarter, Grey's totals were 49, 28, and 72, again below the 80 items requirement. Grey asserted that he did not meet the production standard because almost all of his work was taken from him in February or March of 1979 and no new work was assigned to him. He also charged that the work he did complete was sitting on a reviewer's desk and he was not getting credit for them. He continued to complain of this situation throughout the next quarter.

Wroblewski gave Grey another quarter to improve his production. He informed Grey in a memorandum that if he did not bring his production up to standard during the nonths of July, August, and September 1979, Wroblewski would recommend his dismissal.

In July, Grey completed in excess of 100 items. However, in August his total was again below the standard. In September, Wroblewski told Grey that his August total was below standard but did not advise him that he would be discharged. Grey apparently believed that he would be terminated anyway, and he submitted his resignation on September 14, 1979.

In May 1982, Grey filed the pending action. In April 1986, after substantial discovery, defendants moved for summary judgment on both counts of the amended complaint. On July 9, 1986, the trial court dismissed the constructive retaliatroy discharge claim, *sua sponte,* and granted defendants' motion for summary judgment as to intentional infliction of emotional distress.

OPINION

I.

Grey asks this court to recognize a cause of action for constructive retaliatory discharge, which he does not specifically define. We presume that the only difference between this tort and

retaliatory discharge[1] is that in the former case, the employer "forces" the employee to quit, rather than actually discharging him. The theary is easy enough to grasp; the application is not.

[1]There are three elements necessary to state a cause of action for retaliatroy discharg: (1) the employee was discharged; (2) the discharge was caused by or in retaliation against the employee's activities; and (3) the discharge violates a clear mandate of public policy. *Hinthorn v. Roland's of Bloomington, Inc.* (1988), 119 Ill.2d 526, 519 N.E.2d 909.

In the pending case,, Grey was not discharged from his job. Nor was he told to resign, as was the situation in the on Illinois case in which the concept of forced resignation was held to suffice for the discharge element. (*Hinthorn v. Roland's of Bloomington* (1987), 151 Ill. App.3d 1006, 1009, 503 N.E.2d 1128, aff'd (1988), 119 Ill. 2d 526, 519 N.E.2d 909.

In *Hinthorn,* plaintiff alleged that she had sustained back injuries at work for which she had made a claim; that he employer told her she had been getting injured too often and that she must sign a "voluntary resignation" form; that she did not fully understand the form but knew that she would be fired if she did not sign it; and that her employer forced her to sign the form in retaliation for seeking workers' compensation medical benefits. The trial court dismissed the complaint for failure to state a cause of action, relying on a decision of the Fourth District Appellate Court, *Scheller v. Health Care Service Corp.* (1985), 138 Ill. App. 3d 219, 485 N.E.2d 26, which refused to extend the tort of retaliatory discharge to a situation in which the employee alleged that she was constructively discharged because the employer had purposely made he employment unbearable.

The same district of the appelate court that decided *Scheller* distinguished its facts from those alleged in *Hinthorn,* however, and ruled that the plaintiff had not excercised free will in resigning, since she signed the form under threat of discharge. The *Hinthorn* court stood by it holding in *Scheller* that the alleged "constructive" discharge of an employee through a pattern of harassment is **not** sufficient to fit within the retalitory discharge tort. (151 Ill. App. 3d 1006 1008-09, 503 N.E.2d 1128.) Athough expressing some concern for harassment-related resignation, the *Hinthorn* court noted that substantial difference exist between the *Scheller* situation and that of a "weaker willed and less

sophisticated" employee who is **told** to resign in retaliation for excercising rights protected by public policy. "When the resignation is motivated by harassment, the situation is more complex with less certainties of proof, and the conduct of the employer is more attenuated from the resignation than, as here, where the employer is alleged to have told the employee to resign. The danger of an employer undertaking a course of harassment to retaliate against an employee is much less than merely demanding the resignation. On the other hand, the danger to the employer of false claims are [sic] much less when the discharge element of the tort is based on a demand for resignation by the employer than when it is based on harassment." 151 Ill. App. 3d 1006, 1008-09, 503 N.E.2d 1128, 1130.

The Illinois Supreme Court affirmed the appelate court in *Hinthorn,* concluding that the plaintiff had adequately alleged a cause of action in retaliatory discharge, but making it "abundantly clear that [the court was] not now endorsing the constructive discharge concept rejected by the appellate court in *Scheller.*" (119 Ill. 2d 526, 530-31, 510 N.E.2d 909, 912.) The Illinois Supreme Court did not rule upon the viability of the constructive discharge theory in relation to the facts before it because it found that "plaintiff allege[d] that she was actually and not constructively discharged." (119 Ill. 2d 526, 531, 519 N.E.2d 909, 912.) In so finding, the court relied on the allegation that the defendant essentially told the plaintiff to seek work elsewhere after she requested medical attention. Plaintiff was given the clear message that she was being discharged and her execution of the "voluntary resignation" form was coerced. Had she refused to sign she whould have been discharged anyway.

As previously noted, the facts before us do not indicate theat Grey was actually discharged or that he was told to resign. The bank had a fairly detailed and lengthy administrative process that it appears to have followed in instituting disciplinary action against Grey. Grey does not deny that he was given abundant notice of his alleged violations of bank policy, orally and in writing, every step of the way. This court does not sit in review of the internal disciplinary proceedings of the bank and we need not express an opinion as to the alleged harassing nature of the proceedings. As the trial court noted, "there is little doubt that [Grey's] version of these events as set forth in his deposition testimony and his affidavit arguable presents an issue of fact on

the question of [defendants'] motivation for instituting disciplinary was, in fact, well grounded." Nevertheless, the trial court was bound, as we are, by existing Illinois law. We must follow the reasoning of *Scheller*, approved in *Hinthorn*, which found that "constructive discharge is not an actionable concept" in regard to retaliatory discharge.[2] *Scheller v. Health Care Service Corp.* (1985), 138 Ill. App. 3d 219, 223, 485 N.E.2d 26, 30.

We conclude that Grey has failed to state an actionable claim of constructive retaliatory discharge and that the trial court's dismissal of Count I of the complaint was proper.

Because of our holding that the discharge element is lacking we need not consider whether Grey adequately alleged the other elements of retaliatroy discharge i.e., wheather the discharge was in retaliation for the employee's activities and whether the discharge violated a clearly mandated public policy.

[2]Some confusion may arise from the Illinois Supreme Court's Characterization of *Hinthorn* as involving "actual", rather than "constructive" retaliatory discharge, although from the context it is evident the *Hinthorn* plaintiff's "resignation" was not voluntary in any sense of the word. Hence, it was not a resignation at all, but a true discharge. In contrast, *Scheller* and the instant case both involve a voluntary act of resignation, even though the respective plaintiffs may well have felt that their very health and well-being was on the line.

While this court certainly does not condone alleged harassment of employees, we are bound to follow the supreme court's lead in the retaliatory discharge arena. In addition to its recent comments in *Hinthorn*, the court has previously indicated that it is not in favor of expanding the tort. *Barr v. Kelso-Burnett Co.* (1985), 106 Ill. 2d 520, 478 N.E.2d 1354.

II.

The second issue on appeal is whether the trial court erred in granting summary judgement in favor of defendants on Count II or the complaint, which sounds in intentional infliction of emotional distress.

The elements of this tort are as follows: The defendant's conduct is extreme and outrageous, causing the plaintiff severe emotional distress such that defendant knew that his acts would be substantially certain to cause severe emotional distress. *Owens v. Second Baptist Church* (1987), 163 Ill App. 3d 442, 448, 516 N.E.2d 712. This standard is so stringent that it is met only if the

distress inflicted is so severe that no reasonable person could be expected to endure it. E.g., *Public Finance Corp. v. Davis* (1976) 66 Ill. 2d 85, 90, 360 N.E.2d 767, 767.

The facts that have met this tough pleading standard have included a coercive factor, such as an employer's attempt to cause the employer to commit an illegal act *(Milton v. Illinois Bell Telephone Co.* (1981), 101 Ill. App. 3d 75, 427 N.E.2d 829) or the existence of a pattern of harassment involving extreme and continuous calls and letters of a threatening and profane or obscene nature. *(Sherman v. Field Clinic* (1979), 74 Ill. App. 3d 21, 392 N.E.2d 154.) Neither situation is involved in the pending case.

Grey cites the recent opinion of *McGrath v. Fahey* (1987), 163 Ill. App. 3d 584, N.E.2d , as support for his contention that the bank's alleged conduct constituted intentional infliction of emotional distress. In *McGrath*, the plaintiff, owner of certain real estate, contracted to sell the property to defendant owner of a bank. The parties subsequently accused each other of fraud. Plaintiff then attempted to remove $1 million worth of certificates of deposit he had in the bank, which he held in trust for third parties. The bank refused to release the certificates because of the dispute over the sales transactions. Plaintiff advised the bank of his heart condition and told the bank's attorney that he was becoming extremely anxious about the matter. The bank's attorney told plaintiff that he must assign to the bank his interest in certain second mortgages held in connection with the contract, and if he refused, the bank would financially ruin him and his medical practice.

Plaintiff suffered a massive heart attack and underwent open heart surgery.

Therafter, the bank continued for a time to refuse the transfer of the certificates of deposit. After the certificates were transferred, however, the bank dishonored eight drafts drawn against various accounts that were owned by plaintiff, his wife, his business, and a trust account. In addition, the bank telephoned plaintiff, over his objection, several times while he was recovering from the surgery. The bank also filed suit against him and sent him a letter stating that the bank was setting off plaintiff's accounts against the amount it claimed to be due in its lawsuit against plaintiff.

The *McGrath* court reasoned that whether or not defendants

conduct constitued intentional infliction of emotional distress before the heart attack was "arguable." (163 Ill. App. 3d 584, 590, N.E.2d , .) Afterwards, however, the bank's conduct "was certain or substantially certain to cause plaintiff severe emotional distress in light of the seriousness of his health***." 163 Ill. App. 3d 584, 590, N.E.2d , .

The *McGrath* situation is easily distinguishable from that in the case before us. The pattern of conduct that the bank used against the plaintiff was designed to coerce him to assign his second mortages. The bank's overreaching and abuse of fiduciary responsibility was particularly specious when it continued after it knew of plaintiff's open heart surgery. The bank had no legal right to withhold the certificates, dishonor the drafts drawn on the accounts, or apply as a setoff against plaintiff's alleged liability the funds that plaintiff heald as trustee for third parties. Accordingly, the court reversed the dismissal of the complaint for failure to state and cause of action.

In the present case, the bank was not extorting Grey or attempting to ruin him financially. Regardless of its motivation, the bank did follow its internal policies annd procedures for the disciplinary proceedings. In addition, defendants appear to have given Grey time off for his illness and did not penalize him for the absenteeism.

The courts have recognized that questioning of job performance and personality conflicts are unavoidable aspects of employment and that stress is often the result; however, such stress connot form the basis of the tort of intentional inflictionn of emotional distress or virtually employee would have a cause of action. (E.g., *Heying v. Simonaitis* (1984), 126 Ill. App. 3d 157, 466 N.E.2d 712. See also *Harris v. First Federal Saving & Loan Association of Chicago* (1984), 129 Ill. App. 3d 978, 473 N.E.2d 457 (plaintiff who was criticized, demoted, and ultimately discharged after reporting alleged criminal activity to her supervisor did not state a cause of action, since she did not allege that her employer's conduct was calculated to cause her to engage in illegal activity). We conclude that the trial court did not err in granting defendants' motion for summary judgment onn Count II of the complaint.

For the foregoing reasons, we affirm the decision of the trial court in its entirety.

Affirmed. JOHNSON and McMORROW, JJ., concur.

18 USCS Sec. 4. Misprision of felony

Whoever, having knowledge of the actual commissionn of a felony congnizable by a court of the United States, conceals and does not as soon as possible make known the some to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

18 USC Sec. 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner [magistrate] or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner [magistrate] or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner [magistrate], or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner [magistrate], or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 USC Sec. 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminalinvestigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

18 USC Sec. 1512. Tampering with a witness, victim, or an informant

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to—
(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceedings; or
(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an offical proceeding; or
(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commussion of a Federal offense or a violation or conditions of probation, parole, or release pending judicial proceedings;
shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, pervents or dissuades any person from—
(1) attending or testifying in an official proceeding;
(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probating, parole, or release pending judicial proceedings;
(3) arresting or seeking the arrest of another person in connection with a Federal offense; or
(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceedings;
or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.
(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisited solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section—
(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect ot the circumstance—
(1) that the official proceeding before a judge or court of the grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section.

18 USC Sec. 1513. Retaliating against a witness, victim, or an informant

(a) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceedings;

or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings given by a person to a law enforcement officer;

or attempts to do so, shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) There is extraterritorial Federal jurisdiction over an offense under this section.

18 USC Sec. 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty or perjury as permitted under section 1746 of title 28, United States Code [28 USCS § 1746], willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscriptionn is made within or without the United States.

18 USC Sec. 1622. Subornation of perjury

Whoever procures another to commit any perjury is Guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.